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6 **CITY OF SEATTLE**  
7 **PUBLIC SAFETY CIVIL SERVICE COMMISSION**

8 IN RE THE APPEAL OF:

9 B.T. ROBERT MAHONEY,

10 Appellant,

11 vs.

12 CITY OF SEATTLE, SEATTLE  
13 POLICE DEPARTMENT,

14 Respondent/Employer.

No. 09-001

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

15  
16 **I. INTRODUCTION**

17 The Commission heard this matter pursuant to a Notice of Appeal filed by Officer  
18 Bernard T. Robert Mahoney appealing disciplinary action imposed by the Seattle Police  
19 Department (Department). Chief Kerlikowske suspended Officer Mahoney for 30 days and  
20 transferred him out of the Training Unit of the Department.

21 The Commission held a full evidentiary hearing on May 1, 4, and 5, 2009, before  
22 Commissioners Joel Nark, Herb Johnson and Terry Carroll, with Commissioner Nark acting as  
23 Presiding Officer. The parties submitted briefs on May 29, 2009, which is therefore the date the  
Commission record closed. The Commission has jurisdiction over this matter pursuant to Article

1 XVI, Section 3 of the Seattle City Charter and Chapter 4.08 of the Seattle Municipal Code. The  
2 Commission may affirm, reverse or modify the department's decision. SMC 4.08.100.

3 The standard of review is found in SMC 4.08.100 and Commission Rule 6.21. The  
4 Department has the burden of showing by a preponderance of evidence that the discipline was  
5 "in good faith for cause." The Commission has the authority to affirm, reverse, or modify the  
6 decision of the employing department pursuant to SMC 4.08.100.A.

7 The Commission has utilized several factors in analyzing whether the Department has  
8 met its burden. The factors are not exclusive - nor are they elements that each must be proven.  
9 As the Commission has repeatedly said in prior decisions, the factors are just that - factors it  
10 considers in its analysis.

11 The factors include whether: (1) the employee had notice that his or her conduct would  
12 result in disciplinary consequences; (2) the rule was reasonable; (3) the employer investigated to  
13 determine whether the rule was in fact violated; (4) the investigation was fair; (5) the employer's  
14 decision-maker had substantial evidence that the employee violated the rule as charged; (6) the  
15 employer applies its rules even-handedly; and (7) the discipline administered was fair in relation  
16 to the nature of the offense and imposed with regard to the employee's past work record.<sup>1</sup>

17 The Commission analyzes each of the two charges in light of the factors to determine  
18 whether the Department had just cause to impose the disciplinary action. After considering the  
19 evidence in this case, including testimony, documentary evidence, and arguments of the parties  
20 and their representatives, the Commission enters the following Findings of Fact, Conclusions of  
21 Law and Order, as provided in SMC 4.08.100.<sup>2</sup>

## 22 **II. FINDINGS OF FACT**

23 1. The Appellant, Officer B.T. Robert Mahoney, has been employed as a Seattle

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<sup>1</sup> See PSCSC #07-005 Marcia Kinder v. SFD; PSCSC #06-006 Richard Roberson v. SPD; and PSCSC # 07-007 Felton J. Miles III v. SPD

<sup>2</sup> Unless noted otherwise, individual findings of fact and conclusions of law are unanimously adopted by the Commission.

1 Police Officer for 10 years. At the time of his suspension, Officer Mahoney was assigned to the  
2 Department's Training Unit.

3 2. Prior to the suspension, Officer Mahoney had no disciplinary record during his 10  
4 years of service.

5 3. In 2007, Officer Mahoney became acquainted with Heather Newstrom, a senior at  
6 Holy Names Academy. She was a leader in the Department's Explorer program and was often at  
7 the Department's training facility.

8 4. On April 7, 2008. Ms. Newstrom reported that Officer Mahoney forcibly kissed  
9 her on the lips earlier that evening after all the other SPD employees left the training unit. She  
10 reported the details of the incident to Explorer Advisor Azrielle Johnson, who documented Ms.  
11 Newstrom's complaint and drafted a memo to Assistant Chief Nick Metz.

12 5. On April 10, 2008, the Department's Office of Professional Accountability (OPA)  
13 began investigating the allegation.

14 6. The Department concluded that Ms. Newstrom was credible and charged Officer  
15 Mahoney with misconduct. SPD later added the dishonesty charge based on official statements  
16 Officer Mahoney made during the OPA investigation. Chief Kerlikowske reviewed the  
17 investigation and imposed a 30-day suspension and a disciplinary transfer.

18 7. In the hearing before the Commission, Officer Mahoney denied the allegations  
19 and further alleged the OPA investigation was biased against him.

### 20 III. CONCLUSIONS OF LAW

#### 21 The Misconduct Charge – Inappropriate Contact with Ms. Newstrom

22 8. Notice – Officers are responsible for knowing the Department manual. Officer  
23 Mahoney had proper notice and knowledge that inappropriate contact with an Explorer would  
result in disciplinary action against him and that an unwelcome kiss was an inappropriate  
contact.

1           9.     Reasonableness of Rule – Officer Mahoney was in a position of trust in the  
2 Training Unit and relative to the Explorers in the program. A prohibition against inappropriate  
3 contact (such as an unwelcome kiss) with program Explorers is eminently reasonable.

4           10.    Fairness of Investigation – The OPA conducted an investigation which included  
5 interviews with Officer Mahoney, Ms. Newstrom and others associated with the Explorer  
6 Program, the Training Unit and the Department. The Commission majority concludes that  
7 Officer Mahoney did not introduce evidence to support a nexus between the alleged bias against  
8 him in the Department and the investigation the Department conducted in this case. The  
9 Commission majority also concludes there is no substantial evidence to support Officer  
10 Mahoney’s claim that the investigation of the misconduct charge was either improperly  
11 motivated or biased against him. The Commission unanimously concludes that the investigation  
12 of the misconduct charge was conducted fairly.

13           11.   Chief had Substantial Evidence – The Commission unanimously concludes that  
14 Chief Kerlikowske had substantial evidence that Officer Mahoney had inappropriate contact with  
15 Ms. Newstrom. The Chief found Ms. Newstrom’s allegation to be credible regarding this  
16 incident. Officer Mahoney and Ms. Newstrom told diametrically opposing stories. Based on the  
17 investigation and reports, the Chief of Police found there was substantial evidence to support Ms.  
18 Newstrom’s version of events and to conclude that Officer Mahoney had engaged in misconduct.  
19 The Commission also heard testimony from Ms. Newstrom and Officer Mahoney and concludes  
20 that the Chief of Police had ample evidence to believe Ms. Newstrom’s version of the events,  
21 based on her immediate and later consistently similar descriptions of the incident and her  
22 complete lack of any demonstrated motivation to falsely make such an allegation.

23           12.    Evenhandedness of Discipline –The Commission unanimously concludes that  
Officer Mahoney did not introduce evidence to support a nexus between the alleged bias against  
him in the Department and the disciplinary decision the Chief of Police made in this case. The  
Commission majority also concludes that Officer Mahoney did not introduce any substantial  
evidence to support his claim that the misconduct discipline was imposed in an inconsistent or  
unfair manner.

1           13.    Proportionality – The Commission majority concludes that a 30-day suspension  
2 and disciplinary transfer was fair because of the serious nature of the misconduct. Although  
3 Officer Mahoney had a good record previous to this incident, he was in a special position of  
4 trust. His mentoring role with Ms. Newstrom and his authoritative position in the program made  
5 her especially vulnerable to his misconduct. The Commission majority also concludes that  
6 Officer Mahoney did not introduce any substantial evidence to support his claim that the degree  
7 of discipline was disproportional in light of his record and the discipline imposed in other cases.

8           **The Dishonesty Charge – Lying in the OPA Investigation**

9           14.    As noted above, the Commission unanimously concluded that the Department had  
10 just cause to discipline Officer Mahoney by transferring and suspending him for misconduct.  
11 The Commission majority also concluded that the Department had met its burden of showing it  
12 had just cause to impose a suspension of 30 days for that misconduct.

13           15.    However, a unanimous Commission has serious concerns about the application of  
14 dishonesty charge in this case.

15           16.    Notice. First, the Commission unanimously concludes that the Department may  
16 discipline employees for dishonesty. The SPD manual has for the entire time applicable in this  
17 case prohibited dishonesty and therefore put officers on notice that dishonesty could result in  
18 discipline.<sup>3</sup> However, the Commission is also unanimous in its concern that officers have  
19 appropriate notice regarding when and under what circumstances dishonesty charges may be  
20 brought. The Commission is particularly concerned that every misconduct case not  
21 automatically also become a dishonesty case against the officer simply because the Chief of  
22 Police resolves the differing statements in favor of another witness. A written policy describing  
23 the circumstances under which imposition of dishonesty charges could provide such notice to  
Department employees.

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<sup>3</sup> A new version of the applicable collective bargaining agreement (CBA) was adopted during the pendency of the OPA investigation of this case. It included new language regarding terminations in dishonesty cases and the level of proof required in such cases. The parties disagree about the importance of those changes to this appeal. The Commission does not have authority to construe ambiguity in a CBA, but also concludes that it need not construe the CBA, since by its plain language it applies to termination cases. This is a suspension and transfer case – not a termination case.



1 **V. ORDER**

2 1. The Commission affirms the Department's disciplinary transfer and 30-  
3 day suspension of Officer Mahoney for misconduct.

4 2. The Commission dismisses the charge of dishonesty.

5 Dated this 29<sup>th</sup> day of July, 2009.

6 **PUBLIC SAFETY CIVIL SERVICE COMMISSION**  
7 **OF THE CITY OF SEATTLE**

8 /s/ Herbert V. Johnson

Commissioner Herbert V. Johnson

\_\_\_\_\_  
Date

9 /s/ Terry Carroll

Commissioner Terry Carroll

\_\_\_\_\_  
Date

10 **PARTIAL DISSENT**

11 I agree with the Commission majority that the Department has shown that Officer  
12 Mahoney engaged in serious misconduct. I also agree that the Department had just cause to  
13 transfer Officer Mahoney from the Training Unit, and to suspend him for that misconduct.

14 I also agree with the Commission majority that the circumstances surrounding the  
15 dishonesty charge are troubling. I am concerned that every case of conflicting statements that  
16 the Chief of Police resolves in favor of another witness, whether SPD or civilian, not become a  
separate dishonesty charge.

17 I do not agree, however, that the Department had just cause to suspend Officer Mahoney  
18 for 30 days for this offense. Given his good record before this incident, I would find that the  
19 Department had just cause to suspend him for no more than 15 days for this incident of  
misconduct which, although serious, does not in my opinion justify a 30 day suspension.

20  
21 /s/ Joel Nark

7/29/09

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Commissioner Joel Nark

\_\_\_\_\_  
Date